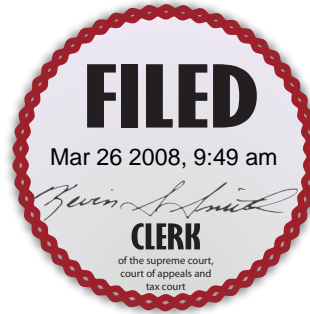


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

RODOLFO S. MONTERROSA, JR.
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

J.T. WHITEHEAD
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

EDGAR HERNANDEZ,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 20A05-0703-CR-145

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable David C. Bonfiglio, Judge
Cause No.20D06-0509-CM-893

March 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Edgar Hernandez appeals his conviction of operating a vehicle while intoxicated, a Class A misdemeanor. On appeal, Hernandez raises three issues, which we restate as 1) whether the trial court properly refused to exclude a video recording of Hernandez's traffic stop based on the State's alleged failure to comply with discovery procedures; 2) whether the trial court properly admitted into evidence statements Hernandez made during the investigation; and 3) whether sufficient evidence supports Hernandez's conviction. We affirm, concluding Hernandez has failed to show the State violated discovery procedures, the trial court properly admitted Hernandez's statements into evidence, and sufficient evidence supports Hernandez's conviction.

Facts and Procedural History

On the evening of September 16, 2005, Captain Sean Holmes of the Elkhart County Sheriff's Department observed a vehicle drive onto a median near the intersection of Ash Road and Old US 20 in Elkhart County. The vehicle headed southbound on Ash Road after driving off the median, and later strayed into the northbound lane causing two approaching vehicles to move to the side of the road. Concerned the vehicle might cause an accident, Captain Holmes activated his vehicle's overhead lights in an attempt to order the vehicle to the side of the road. In response, the vehicle returned to the southbound lane, but again briefly strayed into the northbound lane. Captain Holmes then activated his siren, and the vehicle stopped on the side of the road.

When Captain Holmes approached the driver, later identified as Hernandez, he

observed that Hernandez was “kind of trembling and appeared very lethargic.” Transcript at 27. Based on these observations, Captain Holmes asked Hernandez to step out of the vehicle. As Hernandez exited, Captain Holmes observed that Hernandez’s eyes were “red and glassy,” that he was unsteady on his feet, and that he had to brace himself against his vehicle. Id. at 36. Despite his belief that Hernandez was “probably one of the more impaired persons I’ve seen trying to get out of [a] car,” Captain Holmes did not smell alcohol and was “a little perplexed about what was going on.” Id. at 28. Captain Holmes asked Hernandez “if he’d taken anything,” and Hernandez replied he had ingested a sleeping pill. Id. Based on this response, Captain Holmes contacted Officer Michael McHenry, a drug recognition expert, to assist him with the investigation. While he was waiting for Officer McHenry, Captain Holmes administered three field sobriety tests; Hernandez failed all of them.

When Officer McHenry arrived, Hernandez agreed to participate in a twelve-step “drug recognition evaluation,” which Officer McHenry conducted in an office at the sheriff’s department. The evaluation included Hernandez answering questions about his health, performing sobriety tests including those Captain Holmes had administered, and having his vital signs checked. During the evaluation, Hernandez told Officer McHenry that earlier that evening, he had taken “two pills” of Amitriptyline that his doctor had prescribed as treatment for insomnia. Id. at 72. Based on this statement and on his observations during the evaluation, Officer McHenry concluded Hernandez “was impaired from a depressant.” Id. at 86. Following the evaluation, Hernandez agreed to submit to blood and urine testing at Elkhart General Hospital. The results indicate Hernandez tested negative for the presence of

eleven substances, including amphetamine, cocaine metabolite, and benzodiazepines.

The State charged Hernandez with operating a vehicle while intoxicated, a Class A misdemeanor. At trial, Captain Holmes and Officer McHenry testified to the events described above, and Hernandez admitted into evidence the results from the blood and urine tests. The jury found Hernandez guilty, and the trial court accepted the jury's verdict and entered a judgment of conviction. Following a sentencing hearing, the trial court sentenced Hernandez to one year suspended to probation, with the exception that Hernandez serve three weekends at a work release center. Hernandez now appeals.

Discussion and Decision

I. Failure to Exclude Video Recording

Hernandez argues the trial court improperly refused to exclude a video recording of the traffic stop as a sanction for the State's alleged violation of discovery procedures. This court gives considerable discretion to the trial court in handling discovery matters. Braswell v. State, 550 N.E.2d 1280, 1283 (Ind. 1990). The rationale for granting such discretion is that "the trial court is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated" due to a discovery violation. Id. Accordingly, a trial court's decision regarding a discovery violation will not be disturbed absent "an abuse of discretion involving clear error and resulting prejudice." Berry v. State, 715 N.E.2d 864, 866 (Ind. 1999).

Hernandez appears to argue that the State violated discovery procedures when it provided him with the video recording on the day of his trial. However, Hernandez has

neither cited a rule nor a discovery order from the trial court indicating that the State's conduct constitutes a violation. The local rules state that "[i]n any criminal case, each party shall routinely disclose . . . videotapes . . . the party may introduce at . . . trial," Elkhart LR20-CR00-CRDD-14, but nothing in the record indicates the State violated this rule. At a hearing on the day of trial, Hernandez's counsel stated that he "was aware of the fact that there was a video," but had not received a copy despite having asked the State to make one three weeks previously. *Id.* at 14. In response, the State explained that it did not have the equipment to make a copy and that it had a conversation with Hernandez's counsel "a week before trial by phone indicating that much and, in addition, ultimately this video was at the police station able to be subpoenaed by either party" *Id.* Thus, Hernandez's counsel was aware of the recording at least three weeks prior to trial, but never issued a subpoena or sought an order from the trial court to obtain it. Under such circumstances, we fail to see how the State's conduct constitutes a violation of discovery procedures.¹

Even if the State had violated discovery procedures, Hernandez's argument fails for two other reasons. First, Hernandez overlooks that "[f]ailure to alternatively request a continuance upon moving to exclude evidence, where a continuance may be an appropriate remedy, constitutes a waiver of any alleged error pertaining to noncompliance with the court's discovery order." *Warren v. State*, 725 N.E.2d 828, 832 (Ind. 2000). Hernandez does not argue, nor does our review of the record reveal, that his counsel requested a continuance.

¹ Although we conclude the State did not violate discovery procedures, by no means do we condone the State's conduct. Assuming the State knew it lacked the equipment to make a copy of the video at the time

Second, Hernandez cannot establish that the recording's admission into evidence prejudiced his right to a fair trial. See Berry, 715 N.E.2d at 866. To the extent the events depicted in the recording are discernable,² they are merely cumulative of Captain Holmes's testimony and therefore did not prejudice Hernandez's substantial rights. Cf. Montgomery v. State, 694 N.E.2d 1137, 1140 (Ind. 1998) (stating that a trial court's admission of improper hearsay testimony will not result in reversal if it is merely cumulative of other evidence). Thus, even if the State had violated discovery procedures, Hernandez either waived any alleged error or failed to show such error prejudiced his right to a fair trial.

II. Hernandez's Statements

Hernandez argues the trial court improperly admitted several incriminating statements because there was insufficient evidence of the corpus delicti. "A defendant's extrajudicial confession may be introduced into evidence only if the State establishes the corpus delicti of the crime by independent evidence." Johnson v. State, 653 N.E.2d 478, 479 (Ind. 1995). This evidence need not prove that a crime was committed beyond a reasonable doubt; instead, it must merely provide an inference that a crime was committed. Workman v. State, 716 N.E.2d 445, 447-48 (Ind. 1999). This inference may be established by circumstantial evidence. Id. at 448. The primary purpose of this rule is to reduce the risk of convicting a

it received the request from Hernandez's counsel, it should have promptly notified counsel of such instead of waiting two weeks to do so.

² Assuming our equipment was working properly, the recording this court reviewed was of very poor quality, as it depicted the traffic stop clearly for only brief intervals lasting less than one second. Cf. Appellee's Brief at 9 ("[T]he tape's quality is so poor, (at least as viewed on the State's machinery), that counsel is hard-pressed to diagnose an impact on the jury one way or the other."). Moreover, although the record indicates a nine-minute portion of the recording was played to the jury, the record does not indicate which nine-minute portion was played.

defendant based on his confession to a crime that did not occur. Willoughby v. State, 552 N.E.2d 462, 466 (Ind. 1990).

Hernandez argues there was insufficient evidence of the corpus delicti because the blood and urine test results were “absolutely negative to any intoxicants in [his] system” and therefore “directly contradicted” evidence of intoxication. Appellant’s Brief at 8. Although the blood and urine test results are relevant to determining whether sufficient evidence supports Hernandez’s conviction, a point we discuss in further detail in Part III, *infra*, we do not think it follows that such results aid our determination of whether there was sufficient evidence of the corpus delicti. Because the primary purpose of the corpus delicti rule is to reduce the risk of confessing to a crime that did not occur, Willoughby, 552 N.E.2d at 466, our review is limited to whether the evidence (circumstantial or otherwise) supports a reasonable inference that a crime was committed, Workman, 716 N.E.2d at 488, not whether the evidence negates such an inference. With that distinction in mind, we note that Captain Holmes testified that he observed Hernandez drive onto a median and stray into the oncoming traffic lane twice. Captain Holmes also testified that Hernandez was unsteady on his feet, had to brace himself against his vehicle, and failed three sobriety tests. This evidence is sufficient to support a reasonable inference that Hernandez was operating a vehicle while intoxicated.

III. Sufficiency of Evidence

Hernandez argues insufficient evidence supports his conviction of operating a vehicle while intoxicated. Our supreme court recently reiterated the standard of review to apply in examining a challenge to the sufficiency of the evidence:

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations, footnote, and citations omitted) (emphasis in original).

To convict Hernandez of operating a vehicle while intoxicated as a Class A misdemeanor, the State was required to prove beyond a reasonable doubt that Hernandez operated a vehicle while intoxicated in a manner that endangered a person. See Ind. Code § 9-30-5-2. Several terms are worth defining. Indiana Code section 9-13-2-86 defines “intoxicated” as “under the influence of . . . a drug . . . so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties.” Indiana Code sections 9-13-2-49.1 and 16-18-2-199 reveal that “drug” includes “a drug that is . . . subject to 21 U.S.C. 353(b)(1),” Ind. Code § 16-18-2-199, which in turn refers generally to drugs that “shall be dispensed only . . . upon a written prescription of a practitioner licensed by law to administer such drug,” 21 U.S.C. § 353(b)(1); in other words, a prescription drug.

Hernandez does not contest that he was operating a vehicle in a manner that endangered a person. Instead, Hernandez appears to argue that the blood and urine tests conclusively negate any evidence that he was under the influence of a drug.³ See Appellant’s Br. at 9 (“Despite having undergone a breath test as well as a blood test, there was no direct evidence presented of any intoxicants in Hernandez’s system.”). This argument overstates the results of Hernandez’s blood and urine tests. Although the test results were negative, the record indicates that Hernandez was tested for eleven substances, none of which was Amitriptyline. Thus, we reject Hernandez’s argument that the blood and urine tests conclusively negate any evidence that he was under the influence of Amitriptyline, which, according to Hernandez’s admission, his doctor had prescribed for him.

The question remains whether Hernandez was intoxicated within the meaning of Indiana Code section 9-13-2-86. “Intoxication may . . . be established through evidence of consumption of significant amounts of alcohol, impaired attention and reflexes, watery or bloodshot eyes, an odor of alcohol on the breath, unsteady balance, failed field sobriety tests and slurred speech.” Mann v. State, 754 N.E.2d 544, 547 (Ind. Ct. App. 2001), trans. denied. Several of these criteria apply in this case. As mentioned above, Captain Holmes testified that Hernandez’s eyes were “red and glassy,” that he was unsteady on his feet, and that he

³ Hernandez makes other arguments regarding the sufficiency of the evidence, but they either misunderstand our standard of review, see Appellant’s Br. at 5 (“In order for the conviction to stand, it must be so conclusive and found so convincingly to the guilt of the accused that the evidence excludes every reasonable theory of innocence.”), or overlook that a defendant may be properly convicted on circumstantial evidence alone, see Smith v. State, 547 N.E.2d 845, 846 (Ind. 1989); Appellant’s Br. at 10 (“Despite the fact that Hernandez admitted to consuming a sleeping pill, no evidence was presented to the jury that such pill or substance was actually in his system, save for circumstantial evidence.”).

had to brace himself against his vehicle. Tr. at 36. Captain Holmes also testified that he administered three field sobriety tests and that Hernandez failed all of them. Officer McHenry testified that Hernandez failed several sobriety tests administered during the drug recognition evaluation and that Hernandez's vital signs were consistent with a person who was under the influence of a depressant. This evidence, coupled with Hernandez's admission that he had ingested one or two sleeping pills earlier that evening, constitutes sufficient evidence from which a jury could conclude beyond a reasonable doubt that Hernandez was intoxicated. Because Hernandez does not appear to challenge the sufficiency of the remaining elements required to convict him of operating a vehicle while intoxicated, it follows that sufficient evidence exists to support Hernandez's conviction.

Conclusion

The trial court properly refused to exclude the video recording of the traffic stop and properly admitted Hernandez's statements into evidence. Moreover, sufficient evidence supports Hernandez's conviction of operating a vehicle while intoxicated.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.